

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

TYRUS T. SHELLY,

Petitioner,

vs.

ROB JEFFREYS,

Respondent.

**4:24CV3179****MEMORANDUM AND ORDER**

This matter is before the Court on preliminary review of Petitioner Tyrus Shelly's ("Shelly") Petition for Writ of Habeas Corpus (the "Petition") filed pursuant to [28 U.S.C. § 2254](#). [Filing No. 1](#). For the reasons discussed below, it appears Shelly's petition is barred by the governing one-year statute of limitations found in [28 U.S.C. § 2244\(d\)](#). Accordingly, the Court will order Shelly to show cause within 30 days why this case should not be dismissed with prejudice as barred by the statute of limitations.

Also before the Court are Shelly's Motion for Leave to Proceed in Forma Pauperis ("IFP"), [Filing No. 3](#); Motion for Copies, [Filing No. 5](#); and Motion to Appoint Counsel, [Filing No. 6](#). Shelly's IFP Motion does not comply with the terms of [28 U.S.C. § 1915](#), the statute authorizing proceedings in forma pauperis. See [28 U.S.C. § 1915\(a\)\(1\)](#) (requiring the petitioner to submit "an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor"). However, Court records indicate that Shelly has already paid the \$5.00 filing fee. See [Filing No. 1](#) (receipt number 8070708 indicates Shelly paid the \$5.00 filing fee with the filing of his Petition). Accordingly, Shelly's IFP Motion is denied as moot.

Shelly's Motion for Copies, [Filing No. 5](#), requests a "free copy of all documents in case number 4:24cv3179. Forma Pauperis." [Filing No. 5 at 1](#). Pursuant to [28 U.S.C. § 2250](#),

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Shelly has not been granted leave to proceed in forma pauperis in this case so the language in [28 U.S.C. § 2250](#) does not apply. Moreover, at this stage, Shelly has not stated much less demonstrated a need for the copy of the documents which he requests due to limited financial resources to pay for his own copies. See [Filing No. 3](#); see also [\*Cassidy v. United States\*](#), 304 F. Supp. 864, 867–68 (E.D. Mo. 1969), *aff'd*, 428 F.2d 585 (8th Cir. 1970) ("The matter of granting a motion to produce copies of documents under section 2250, and if granted, what copies are to be furnished, is within the discretion of the court. Congress did not intend that documents should be furnished without a showing of need."). Accordingly, Shelly's Motion for Copies will be denied.

Shelly also requests that he be appointed counsel for these proceedings. [Filing No. 6](#). "[T]here is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court." [\*McCall v. Benson\*](#), 114 F.3d 754, 756 (8th Cir. 1997). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner's ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. See, e.g., [\*Wiseman v. Wachendorf\*](#), 984 F.3d 649, 655 (8th Cir. 2021); [\*Morris v. Dormire\*](#), 217 F.3d 556, 558–59 (8th Cir. 2000), *cert. denied*, 531 U.S. 984 (2000); [\*Hoggard v. Purkett\*](#),

29 F.3d 469, 471 (8th Cir. 1994). See also Rule 8(c) of the *Rules Governing Section 2254 Cases in the United States District Courts* (requiring appointment of counsel if an evidentiary hearing is warranted).

For the reasons stated, it appears Shelly's claims are barred by the statute of limitations, thus it is premature to determine whether Shelly potentially meets the criteria for appointment of counsel. Further, despite his professed limitations, Shelly's pleadings and motions have been relatively clear. Thus, the Court finds there is no need for the appointment of counsel at this time. The Court is, however, aware that this situation may change if this litigation progresses. As the Eighth Circuit Court of Appeals instructs, the Court will "continue to be alert to the possibility that, because of procedural complexities or other reasons, later developments in the case may show either that counsel should be appointed, or that strict procedural requirements should, in fairness, be relaxed to some degree." *Williams v. Carter*, 10 F.3d 563, 567 (8th Cir. 1993).

## I. BACKGROUND

Shelly asserts that on November 3, 1995, he pleaded guilty to all charges, except first-degree murder, in Douglas County, Nebraska, case number 136, No. 218. [Filing No. 1 at 1](#). According to Shelly's Petition and state court records, available to this Court online, Shelly pleaded guilty to second degree murder, attempted second degree murder, and two counts of use of a firearm to commit a felony.<sup>1</sup> Shelly was sentenced to 35 years to

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<sup>1</sup> See attached docket sheet and post-conviction order for *State v. Tyrus Shelly*, CR10 9028593; Doc. 136, Page 218, District Court of Douglas County, Nebraska, at <https://www.nebraska.gov/justice/case.cgi>; *Stutzka v. McCarville*, 420 F.3d 757, 761 n.2 (8th Cir. 2005) (court may take judicial notice of public records); Federal Rule of Evidence 201 (providing for judicial notice of adjudicative facts).

life.<sup>2</sup> Shelly alleges in his Petition, and his state court records confirm, that no direct appeal was ever filed.

On August 14, 2003, Shelly filed a motion for postconviction relief in which he asserted that his trial counsel had failed to comply with his request to file a direct appeal. *State v. Shelly*, 782 N.W.2d 12, 13-14 (Neb. 2010). The district court denied postconviction relief without an evidentiary hearing. *Id.* at 14. On November 26, 2003, the Nebraska Supreme Court vacated the judgment of the district court denying postconviction relief and remanded the case to the district court with directions to conduct an evidentiary hearing with respect to Shelly's allegation that his trial counsel had failed to perfect a direct appeal from his plea-based convictions and sentences after being requested to do so by Shelly. *Id.*

On January 23, 2009, Shelly filed a new motion for postconviction relief. *Id.* On June 3, 2009, the district court overruled the motion as procedurally barred as a second and successive motion. *Id.* The district court ordered that "only the one issue required by mandate is to be addressed at the evidentiary hearing." *Id.* The Nebraska Supreme Court concluded that Shelly's second postconviction motion was premature, because proceedings on his first postconviction motion were still pending, so consideration of the second postconviction motion was outside the scope of the mandate on remand from the appeal of the denial of Shelly's first postconviction motion. *Id.* at 16. The Nebraska Supreme Court therefore vacated that portion of the district court's order overruling the

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<sup>2</sup> In his Petition, Shelly alleges he was sentenced to 35 years to life. See [Filing No. 1 at 1](#). A journal entry in Shelly's state court records indicate that he received a sentence of 30 years to life for the second-degree murder charge; 25-30 years on the attempted murder charge; and 5 to 10 years on each of the firearm charges. The sentence in the attempted murder count was to be served concurrent to the sentence for murder and the sentences for his firearm charges were to be served concurrently to each other but consecutive to the other sentences.

second postconviction motion. *Id.* The Supreme Court remanded the case to the district court with directions to dismiss the second postconviction motion without prejudice, and to conduct an evidentiary hearing on the first postconviction motion in accordance with the mandate issued previously. *Id.*

In accordance with the second mandate, the district court held an evidentiary hearing on May 28, 2010. After considering the testimony of Shelly and Shelly's counsel, the district court concluded that Shelly did not instruct his trial counsel to file an appeal within the statutorily required timeframe. Therefore, on June 11, 2010, the district court denied Shelly's motion for postconviction relief. On June 6, 2010, Shelly filed a notice of appeal of the district court's order. The Supreme Court affirmed the district court and, on December 16, 2010, issued its mandate. Shelly's state court records do not reflect any further proceedings.

This Court's records reflect that this is Shelly's first attempt at federal habeas corpus relief. Liberally construed, Shelly first claims state officials violated his Eighth Amendment right to be free from cruel and unusual punishment because he was minor at the time he was sentenced. [Filing No. 1 at 5](#). Shelly also claims that, beginning on July 24, 2012, he has been improperly denied parole. [Filing No. 1 at 7](#).

## II. DISCUSSION

A district court may consider, *sua sponte*, the timeliness of a state prisoner's habeas corpus petition. See [Day v. McDonough](#), 547 U.S. 198, 209 (2006). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), PL 104-132, April 24, 1996, 110 Stat. 1214, establishes a one-year limitations period for state prisoners to file for federal habeas relief that runs from the latest of four specified dates:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

[28 U.S.C. § 2244\(d\)\(1\)](#). However, the statute of limitations period is tolled while a state post-conviction or other collateral review is pending. *King v. Hobbs*, 666 F.3d 1132, 1135 (8th Cir. 2012) (citing [28 U.S.C. § 2244\(d\)\(2\)](#)).

In the present case, it appears from the face of the petition that Shelly's claim is barred by the statute of limitations because the Petition was filed more than one year after Shelly's judgment became final. See [28 U.S.C. § 2244\(d\)\(1\)](#). Shelly's conviction became final, at the latest, on January 18, 2011, upon the expiration of the 30-day appeal period after the state district court filed its order pursuant to the Nebraska Supreme Court's mandate on December 16, 2010.<sup>3</sup> See [Neb. Rev. Stat. § 25-1912\(1\)](#); see also *In re Interest of J.A.*, 510 N.W.2d 68, 71 (Neb. 1994) (a notice of appeal must be filed within 30 days of the date the judgment or order was entered on the journal of the trial court); *State v. Yos-Chigui*, 772 N.W.2d 574, 579 (Neb. 2009) ("In a criminal case, the judgment is the sentence."). Accordingly, for Shelly's first claim, the one-year limitations period began to run, at the latest, from January 18, 2011, and Shelly had until January 18, 2012,

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<sup>3</sup> Thirty days after December 16, 2010, fell on January 15, 2011, which was a Saturday. The following Monday, January 17, 2011, was Martin Luther King, Jr. Day, so Shelly would have had until the next business day, January 18, 2011, to file an appeal to the United States Supreme Court.

to file his habeas petition. For Shelly's second claim, other than stating presumably the first date he was eligible for parole, Shelly alleges no other facts to state when any violation of federal law occurred. Shelly did not file his habeas petition in this Court until October 4, 2024, more than ten years after any limitations period expired. Thus, absent other sufficient tolling or an equitable exception, any claims related to Shelly's convictions or sentences are barred by the statute of limitations.

Accordingly,

IT IS ORDERED that:

1. Shelly is ordered to show cause within 30 days why this case should not be dismissed because it is barred by the statute of limitations. Failure to respond to this order will result in dismissal of this action without further notice to Shelly for the reasons explained above.
2. The Clerk of Court is directed to set a pro se case management deadline in this matter with the following text: **May 28, 2025**: check for response to show cause order.

Dated this 28th day of April, 2025.

BY THE COURT:



Joseph F. Bataillon  
Senior United States District Judge

# Nebraska Judicial Branch

## Case Summary

In the District Court of Douglas County  
The Case ID is CR 10 9028593 Docket Number is 136218  
Citation No.: G 0013992  
State v. Tyrus T Shelly  
The Honorable Gerald E Moran, presiding.  
Classification: Felony-Bindover  
Filed on 02/06/1995 by the County Prosecutor  
This case is Mandated as of 12/13/2010

## Parties/Attorneys to the Case

	Party	Attorney
Plaintiff	ACTIVE	
	State of Nebraska	
Defendant	ACTIVE	
	Tyrus T Shelly 2012 Emmett St , apt.#1/2 Omaha	Brian S Munnely 626 S 19th St., Ste 9 Omaha NE 68102 402-991-8100
	NE 00000	
	Date of Birth is 05/30/1976 Drivers License is	

## Offense Information

This case has been converted from a prior system and  
the information on this screen may not be complete.  
Please check the Register of Actions and Judges Notes  
for more information.

Count	Charge	Offense Class
01	Murder-2nd degree	; Class 1B Felony
	Offense Date is 01/20/1995	
	Plea is Guilty/Admit	
	Finding is Guilty	
	Sentence includes:	
	See Register of Actions/Judges Notes	
	Jail-Minimum Sentence	
	Start Date 11/03/1995	
	Term of 30 Years	
	Jail-Maximum Sentence	
	Start Date 11/03/1995	
	Term of 99 Years	
02	use firearm to commit a felony	; class 3 Felony
	Offense Date is 01/20/1995	
	Plea is Guilty/Admit	
	Finding is Guilty	
	Sentence includes:	
	See Register of Actions/Judges Notes	
	Jail-Minimum Sentence	
	Start Date 11/03/1995	
	Term of 05 Years	
	Jail-Maximum Sentence	
	Start Date 11/03/1995	
	Term of 10 Years	
03	Attempt of a class 1/1A/1B felony	; class 2 Felony
	Offense Date is 01/20/1995	
	Plea is Guilty/Admit	
	Finding is Guilty	
	Sentence includes:	
	See Register of Actions/Judges Notes	
	Jail-Minimum Sentence	
	Start Date 11/03/1995	
	Term of 25 Years	
	Jail-Maximum Sentence	

Start Date 11/03/1995  
Term of 30 Years

04 0 Fake statute-CR Case-Check judges note ; Misdemeanor  
Offense Date is 01/20/1995  
Plea is Guilty/Admit  
Finding is Guilty  
Sentence includes:  
See Register of Actions/Judges Notes  
Jail-Minimum Sentence  
Start Date 11/03/1995  
Term of 05 Years  
Jail-Maximum Sentence  
Start Date 11/03/1995  
Term of 10 Years

## Arresting Officers

## Agency

Omaha Police Department  
Omaha Police Department

## Officer

Leland D Cass  
Robert L Sklenar

## Court Costs Information

Incurred By	Account	Date	Amount
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## Financial Activity

No trust money is held by the court  
No fee money is held by the court

## Register of Actions

04/14/2025 Mail Returned by Post Office  
mae  
Image ID M00023632D01

03/10/2025 Mail Returned by Post Office  
JB  
Image ID M00014837D01

03/19/2011 Disclaimer

03/19/2011 Disclaimer

03/19/2011 Disclaimer

03/19/2011 Disclaimer

12/23/2010 Return Filed  
Sheriff Return No Fees ESC: 017178 TRIP EXECUTED BY DELIVERING PAPERS ONL  
Y TO NE D&E ON 121610  
Image ID 000350358D01

12/16/2010 Judgment on Mandate

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 10 of 25 - Page ID # 42

This action initiated by Gerald E Moran  
Jrn#3799000

Image ID 000312165D01

12/13/2010 Mandate  
Mandate Affirmed ESC: 10-676 FROM NE S/CRT-COSTS TO BE PD BY DO CTY & TAX  
ED @ \$125  
Image ID 000266471D01

09/07/2010 Notice Filed  
RE BOE  
Image ID 000230130D01

08/02/2010 Order  
This action initiated by Gerald E Moran  
Order Jrn#3799000 DO CTY PAY LORI A. GRECKAL THE SUM OF \$26.25  
Image ID 000198311D01

08/02/2010 Bill of Exceptions  
ESC: CARD VOL I  
Image ID 000203764D01

07/28/2010 Letter  
ESC: 00000 RE:RECORD PREPARATION DATE  
Image ID 000198537D01

07/27/2010 Notice Filed  
TRANSCRIPT OF PLEADINGS  
Image ID 000174830D01

07/14/2010 Letter  
ESC: 10-676 FROM NE S/CRT & CRT OF APPEALS RECEIPTING NOTICE OF APPEAL  
Image ID 000182648D01

07/13/2010 Letter  
ESC: 10676 RE: COPY OF MINUTE ENTRY  
Image ID 000178070D01

07/12/2010 Motion-Proceed in Forma Pauperis  
This action initiated by Gerald E Moran  
ESC: SUSTAIN Jrn#3799000 & MOTION FOR POSTCONVICTION RELIEF IS OVERRULED.  
Image ID 000173255D01

07/06/2010 Motion-Counsel  
This action initiated by party Tyrus T Shelly  
Image ID 000165574D01

07/06/2010 Motion-Proceed in Forma Pauperis  
This action initiated by party Tyrus T shelly  
AFFIDAVIT ATTACHED

Image ID 000165573D01

07/06/2010 Request-BOE  
This action initiated by party Tyrus T Shelly  
Image ID 000165572D01

07/06/2010 Request-Appeal Transcript  
This action initiated by party Tyrus T Shelly  
Image ID 000165571D01

07/06/2010 Notice-Appeal to Crt of Appeals

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 11 of 25 - Page ID # 43

This action initiated by party Tyrus T Shelly  
Image ID 000165570D01

06/17/2010 Notice-Judgment sent  
Image ID 000157070D01

06/15/2010 Order-Atty Fee/Reimburse Expenses  
This action initiated by Gerald E Moran  
Jrn#3799000 DOUG CNTY TO PAY BRIAN MUNNELLY \$2019.37  
Image ID 000160141D01

06/15/2010 App-Atty Fees/Reimburse Fees  
This action initiated by party Tyrus T Shelly  
BY BRIAN MUNNELLY  
Image ID 000161450D01

06/10/2010 Order  
This action initiated by Gerald E Moran  
Case Disposed of by Final Order Jrn#3799000 DEFTS MOTION TO AMEND THE MOTION FOR POSTCONVICTION RELIEF IS DENIED.  
Image ID 000151854D01

05/28/2010 Motion Filed  
This action initiated by Gerald E Moran  
Motion to Amend Jrn#3799000 RE: POSTCONVICTION RELIEF IS OVERRULED. POSTCONVICTION HEARING HELD UNDER ADVISEMENT.  
Image ID 000133759D01

05/25/2010 Return Filed  
Sheriff Return No Fees ESC: 016014 DLVD PAPERS ONLY ON DFNT TO NE DOC DEC 051410  
Image ID 000128375D01

05/12/2010 App-Atty Fees/Reimburse Fees  
This action initiated by party Tyrus T Shelly  
BY BRIAN MUNNELLY  
Image ID 000134294D01

05/12/2010 Order-Atty Fee/Reimburse Expenses  
This action initiated by Gerald E Moran  
Jrn#3799000 DO CTY PAY BRIAN S MUNNELLY \$1626.53  
Image ID 000107418D01

05/11/2010 Judgment on Mandate  
This action initiated by Gerald E Moran  
Jrn#3799000  
Image ID 000119631D01

05/06/2010 Mandate  
Mandate Affirmed ESC: 09-618 IN PART & IN PART VACATED & REMANDED W/DIRECTIONS FROM NE S/CRT-COSTS TO BE PD BY DO CTY & TAXED @ \$122  
Image ID 000110782D01

04/28/2010 Notice-Judgment sent  
Image ID 000105733D01

04/23/2010 Order  
This action initiated by Gerald E Moran  
Case Disposed of by Final Order Jrn#3799000 DEFTS SECOND POSTCONVICTION MOTION DISM'D W/O PREJ.  
Image ID 000104881D01

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 12 of 25 - Page ID # 44

04/23/2010 Opinion-Supreme Court

ESC: 09-618 THE JDG IS AFFIRMED IN PART AND IN PART VACATED & REMANDED W/  
DIRECTIONS

Image ID 000091982D01

08/10/2009 Order

This action initiated by Gerald E Moran

Order Jrn#3799000 DO CTY PAY MARGARET TYSKA HEANEY THE SUM OF \$243.50.

Image ID C00099062D01

07/09/2009 Notice Filed

COPY OF TRANS OF PLEADINGS

Image ID C00099061D01

06/26/2009 Motion-Counsel

This action initiated by Gerald E Moran

ESC: OVERRULE Jrn#3799000

06/26/2009 Order-Waive Fine/Costs

This action initiated by Gerald E Moran

Jrn#3799000

Image ID C00099060D01

06/26/2009 Letter

ESC: 9-0618 FROM NE S/CRT RE MOTION TO APPOINT COUNSEL

Image ID C00099059D01

06/26/2009 Letter

ESC: 9-0618 FROM NE S/CRT AND NE COURT OF APPEALS OF RECEIPTING APPEAL

Image ID C00099058D01

06/19/2009 Poverty Affidavit

This action initiated by party Tyrus T Shelly

Image ID C00099057D01

06/19/2009 Request-Appeal Transcript

This action initiated by party Tyrus T Shelly

Image ID C00099056D01

06/19/2009 Motion-Counsel

This action initiated by party Tyrus T Shelly

Image ID C00099055D01

06/19/2009 Notice-Appeal to Crt of Appeals

This action initiated by party Tyrus T Shelly

Image ID C00099054D01

06/02/2009 Order

This action initiated by Gerald E Moran

Order Jrn#3799000 DEFT MOTION FOR POSTCONVICTION RELIEF IS OVERRULED, AND  
ONLY THE ONE ISSUE REQUIRED BY MANDATE IS TO BE ADDRESSED AT EVIDENTI\*

Image ID C00099053D01

06/01/2009 Notice-Take Deposition

TYRUS SHELLY 060409

Image ID C00099052D01

04/23/2009 Pretrial Conference

Pretrial ESC: #1 Sch 05/28/2009 01:15 Jrn#3799000

Image ID C00099051D01

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 13 of 25 - Page ID # 45

04/13/2009 Notice-Take Deposition  
THOMAS RILEY 051409  
Image ID C00099050D01

01/28/2009 Order-Appt Counsel  
This action initiated by Gerald E Moran  
Jrn#3799000 BRIAN MUNNELLY OBO DFNT  
Image ID C00099049D01

01/26/2009 Poverty Affidavit

This action initiated by party Tyrus T Shelly  
Image ID C00099048D01

01/26/2009 Affidavit  
AND VERIFICATION OF MOAPCOV  
Image ID C00099047D01

01/26/2009 Motion-Counsel  
This action initiated by party Tyrus T Shelly  
Image ID C00099046D01

01/26/2009 Motion-Post Conviction Relief  
This action initiated by party Tyrus T Shelly  
Image ID C00099045D01

10/07/2008 Request-Appeal Transcript

This action initiated by Gerald E Moran  
ESC: OVERRULE Jrn#3799000  
Image ID C00099044D01

10/07/2008 Letter  
RE: TRANSCRIPTS  
Image ID C00099043D01

10/03/2008 Request-Appeal Transcript  
This action initiated by party Tyrus T Shelly  
Image ID C00099042D01

01/13/2004 Return Filed  
Sheriff Return No Fees ESC: 003385 JUDGMENT AND SENTENCE ORDER; EXECUTED  
010604 BY DELIVERING PAPERS ONLY ON DEFT TO SDCS

12/12/2003 Order  
This action initiated by Gerald E Moran  
Case Disposed of by Final Order Jrn#3799000 SIGNED JDG ON MANDATE

12/11/2003 Order-Appt Counsel  
This action initiated by Gerald E Moran  
Jrn#3799000 KIM NOVAK APPTD FOR DEFT

12/11/2003 Mandate  
VACATED AND THE CAUSE REMANDED WITH DIRECTIONS. COSTS OF THIS APPEAL ARE  
TO BE PD BY DO CTY AND ARE TAXED AT \$66.5

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12/08/2003 Motion-Counsel

This action initiated by party Tyrus T Shelly

11/04/2003 Order

This action initiated by Gerald E Moran

order Jrn#3799000 DO CTY PAY \$558.50 TO LORI A GRECKEL

10/27/2003 Bill of Exceptions

VOL I

10/03/2003 Notice Filed

COPY OF TRANSCRIPT MAILED TO DEFT

09/19/2003 Letter

This action initiated by party Tyrus T Shelly

ESC: 0000 RE: RECORD PREP DATE

09/16/2003 Letter

ESC: 031045 FROM CLERK OF NE SUPREME COURT RECEIPTING FOR NOTICE OF APPEAL  
L

09/15/2003 Letter

ESC: 031045 BY CLK OF NEB S/CRT AND CRT OF APPEAL RE: MINUTE ENTRY

09/11/2003 Motion-Counsel

This action initiated by Gerald E Moran

ESC: OVERRULE Jrn#3799000

09/08/2003 Motion-Proceed in Forma Pauperis

This action initiated by party Tyrus T Shelly

09/08/2003 Motion-Counsel

This action initiated by party Tyrus T Shelly

09/08/2003 Request-Appeal Transcript

This action initiated by party Tyrus T Shelly

09/08/2003 Request-BOE

This action initiated by party Tyrus T Shelly

09/08/2003 Notice-Appeal to Crt of Appeals

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This action initiated by party Tyrus T Shelly

08/27/2003 Order

This action initiated by Gerald E Moran  
Case Disposed of by Final Order Jrn#3799000 MOTION FOR POST-CONVICTION OV  
ERRULED

08/14/2003 Motion-Post Conviction Relief

This action initiated by party Tyrus T Shelly

08/14/2003 Motion-Counsel

This action initiated by party Tyrus T Shelly

08/14/2003 Motion Filed

This action initiated by party Tyrus T Shelly  
RE: LEAVE TO PROCEED IN FORMA PAUPERI

08/20/1997 Order

This action initiated by Gerald E Moran  
Order Jrn#3799026 DO CTY PAY LORI A BRECKEL \$46.75

08/20/1997 Bill of Exceptions

VOLUME I

08/04/1997 Motion-Proceed in Forma Pauperis

This action initiated by Gerald E Moran  
ESC: SUSTAIN Jrn#3777354

08/01/1997 Letter

ESC: 00 RE: FILINGS

07/30/1997 Letter

ESC: 00 BY CDC TO CRT ADMIN (W/ATTACHED FILINGS) RE: NO NOTICE OF APPEAL  
ON FILE

09/26/1996 Deposition Certificate

This action initiated by party Tyrus T Shelly  
OF DATHEIS CAIN - \$145.35 OBO DEFT

11/17/1995 Return Filed

Sheriff Return ESC: 311138 JUDG & SENT: EXECUTED 11-13-95 BY DELIVERING D  
EFT TO NPCC

11/03/1995 Journal Entry

This action initiated by Gerald E Moran

Judgment and Sentence - Confinement Jrn#3507395 SDCS-- CT 1:30 YRS TO LIF  
E, CT 2:5-10 YRS (CONSECUTIVE TO CTS 1 & 3), CT 3: 25-30 YRS (CONCURREN\*)

10/24/1995 Return Filed

Sheriff Return No Fees ESC: 308792 AMD INFO: REC'D WRIT 9-29-95 RTN'D W/N  
O FUTHER ACTION TAKEN

09/27/1995 Arraignment

Arraignment - Plea of Guilty Jrn#3507020 SENT DEFERRED

09/27/1995 Amended Information

MURDER IN 2ND DEGREE; USE OF FIREARM TO COMMIT FELONY(2); ATTEMPTED MURDE  
R IN 2ND DEGREE

09/05/1995 Motion-Suppress

This action initiated by Gerald E Moran

ESC: OVERRULE Jrn#3492195 STATE GRANTED LEAVE TO ENDORSE ADDITIONAL WITNE  
SSSES

08/17/1995 Motion-Suppress

This action initiated by party Tyrus T Shelly

ESC: CRT#1 Sch 09/05/1995 09:30 RE: STATEMENT, PHYSICAL EVIDENCE & EYE-WI  
TNESS IDENTIFICATION

08/03/1995 Trial/Hearing Scheduled

Sch 09/26/1995 00:00 Jrn#3475282

08/03/1995 Waiver of Speedy Trial

This action initiated by Gerald E Moran  
Jrn#3475282

07/25/1995 Order-Continuance

This action initiated by Gerald E Moran

Jrn#3475212 OF UP TO 90 DAYS W/IN WHICH TIME CO-DEFT'S DEPO IS TO BE TAKE  
N

07/24/1995 Motion Filed

This action initiated by party Tyrus T Shelly

Motion and Notice of Hearing ESC: CRT#1 Sch 07/25/1995 09:00 RE: TAKE DEP  
OSITION

07/24/1995 Motion-Continuance

This action initiated by party Tyrus T Shelly

ESC: CRT#1 Sch 07/25/1995 09:00

07/19/1995 Praecipe-Subpoena

This action initiated by party State of Nebraska

07/12/1995 Notice Filed  
This action initiated by party State of Nebraska  
RE: ENDORSEMENT OF WITNESSES @ TRIAL

06/12/1995 Order-Consolidation  
This action initiated by Gerald E Moran  
Jrn#3449354 W/DOC 136-217

06/08/1995 Motion-Consolidation  
This action initiated by Gerald E Moran  
ESC: MADVISE Jrn#3449336

06/06/1995 Motion Filed  
This action initiated by party State of Nebraska  
Motion and Notice of Hearing ESC: CRT#1 Sch 06/08/1995 01:30 RE: TO SET T  
RIAL DATE

03/28/1995 Trial/Hearing Scheduled  
Sch 07/24/1995 00:00 Jrn#3437046

02/23/1995 Return Filed  
Sheriff Return ESC: 294259 INFO: SERVED 021695 ON DEFT PERSONALLY

02/16/1995 Arraignment  
Arraignment - Plea of Not Guilty Jrn#3418062 BOND CONT'D

02/16/1995 Order-Appt Public Defender  
This action initiated by Gerald E Moran  
Jrn#3418062

02/16/1995 Confidential Document \*  
This action initiated by party Tyrus T Shelly

02/14/1995 Notice-Hearing  
This action initiated by party Tyrus T Shelly  
ESC: CRT#10 Sch 02/16/1995 09:00

02/14/1995 Motion-Discovery  
This action initiated by party Tyrus T Shelly

02/13/1995 Transcript-County Court  
CTY CRT F95-1390 F95-1680 WITNESS FEES \$10.45

02/06/1995 Filing Not Otherwise Specified  
Statement of Costs #003192 \$131.20 110395

02/06/1995 Information  
This action initiated by party State of Nebraska  
ESC: 400000

## Judges Notes

02/06/1995  
#003192 \$131.20 110395  
02/13/1995  
CTY CRT F95-1390 F95-1680 WITNESS FEES \$10.45  
02/16/1995  
BOND CONT'D  
02/23/1995  
INFO: SERVED 021695 ON DEFT PERSONALLY  
06/06/1995  
RE: TO SET TRIAL DATE  
06/12/1995  
W/DOC 136-217  
07/12/1995  
RE: ENDORSEMENT OF WITNESSES @ TRIAL  
07/24/1995  
RE: TAKE DEPOSITION  
07/25/1995  
OF UP TO 90 DAYS W/IN WHICH TIME CO-DEFT'S DEPO IS TO BE TAKEN  
08/17/1995  
RE: STATEMENT, PHYSICAL EVIDENCE & EYE-WITNESS IDENTIFICATION  
09/05/1995  
STATE GRANTED LEAVE TO ENDORSE ADDITIONAL WITNESSES  
09/27/1995  
MURDER IN 2ND DEGREE; USE OF FIREARM TO COMMIT FELONY(2); ATTEMPTED  
MURDER IN 2ND DEGREE  
SENT DEFERRED  
10/24/1995  
AMD INFO: REC'D WRIT 9-29-95 RTN'D W/NO FUTHER ACTION TAKEN  
11/03/1995  
SDCS-- CT 1:30 YRS TO LIFE, CT 2:5-10 YRS (CONSECUTIVE TO CTS 1 &  
3), CT 3: 25-30 YRS (CONCURRENT W/CT 1), CT 4: 5-10 YRS (CONCUR'T W/CT  
2, BUT CONSEC TO CTS 1 & 3), COSTS, CREDIT 283 DAYS ON CTS 2 & 4 ONLY  
11/17/1995  
JUDG & SENT: EXECUTED 11-13-95 BY DELIVERING DEFT TO NPCC  
09/26/1996  
OF DATHEIS CAIN - \$145.35 OBO DEFT  
07/30/1997  
BY CDC TO CRT ADMIN (W/ATTACHED FILINGS) RE: NO NOTICE OF APPEAL ON  
FILE  
08/01/1997  
RE: FILINGS  
08/20/1997  
VOLUME I  
DO CTY PAY LORI A BRECKEL \$46.75  
08/14/2003  
RE: LEAVE TO PROCEED IN FORMA PAUPERI  
08/27/2003  
MOTION FOR POST-CONVICTION OVERRULED  
09/15/2003  
BY CLK OF NEB S/CRT AND CRT OF APPEAL RE: MINUTE ENTRY  
09/16/2003  
FROM CLERK OF NE SUPREME COURT RECEIPTING FOR NOTICE OF APPEAL  
09/19/2003  
RE: RECORD PREP DATE  
10/03/2003  
COPY OF TRANSCRIPT MAILED TO DEFT  
10/27/2003  
VOL I  
11/04/2003  
DO CTY PAY \$558.50 TO LORI A GRECKEL  
12/11/2003  
VACATED AND THE CAUSE REMANDED WITH DIRECTIONS. COSTS OF THIS APPEAL  
ARE TO BE PD BY DO CTY AND ARE TAXED AT \$66.5  
KIM NOVAK APPTD FOR DEFT  
12/12/2003  
SIGNED JDG ON MANDATE  
01/13/2004  
JUDGMENT AND SENTENCE ORDER; EXECUTED 010604 BY DELIVERING PAPERS ONLY  
ON DEFT TO SDGS  
10/07/2008  
RE: TRANSCRIPTS  
Judge Name: MORAN  
Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 19 of 25 - Page ID # 51

(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655) INFORMATION Defendant's praecipe for transcripts denied. Defendant notified by mail.

01/26/2009

AND VERIFICATION OF MOAPCOV

01/28/2009

BRIAN MUNNELLY OBO DFNT

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655) INFORMATION Signed Order Appointing Counsel for Defendant.

04/13/2009

THOMAS RILEY 051409

04/23/2009

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655) INFORMATION Signed Pre-trial Order.

06/01/2009

TYRUS SHELLY 060409

06/02/2009

DEFT MOTION FOR POSTCONVICTION RELIEF IS OVERRULED, AND ONLY THE ONE ISSUE REQUIRED BY MANDATE IS TO BE ADDRESSED AT EVIDENTIARY HEARING.

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)

INFORMATION Signed Order.

06/26/2009

FROM NE S/CRT AND NE COURT OF APPEALS OF RECEIPTING APPEAL

FROM NE S/CRT RE MOTION TO APPOINT COUNSEL

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)

INFORMATION Signed Order granting leave for defendant to proceed in forma pauperis; request for appointment of counsel denied.

07/09/2009

COPY OF TRANS OF PLEADINGS

08/10/2009

DO CTY PAY MARGARET TYSKA HEANEY THE SUM OF \$243.50.

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)

INFORMATION Signed order for court reporter fees.

04/23/2010

THE JDG IS AFFIRMED IN PART AND IN PART VACATED &amp; REMANDED

W/DIRECTIONS

DEFTS SECOND POSTCONVICTION MOTION DISM'D W/O PREJ.

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)

INFORMATION Pursuant to remand with directions from the Nebraska Supreme Court in the above-captioned matter, defendant's second postconviction motion is dismissed without prejudice. Signed Order.

05/06/2010

IN PART & IN PART VACATED & REMANDED W/DIRECTIONS FROM NE S/CRT-COSTS TO BE PD BY DO CTY & TAXED @ \$122

05/11/2010

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN

136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE (10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)

INFORMATION Pursuant to Mandate from the Nebraska Supreme Court, the appeal from the judgment of the District Court of Douglas County, Nebraska is affirmed in part, and in part vacated and remanded with directions and costs in the amount of \$122.00 are to be paid by the Douglas County.

05/12/2010

DO CTY PAY BRIAN S MUNNELLY \$1626.53

BY BRIAN MUNNELLY

4:24-cv-03179-JFB-PRSE Doc # 7 Filed: 04/28/25 Page 20 of 25 - Page ID # 52

Judge Name: MORAN  
Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Signed Order for Attorney Fees.  
05/25/2010

DLVD PAPERS ONLY ON DFNT TO NE DOC DEC 051410  
05/28/2010

RE: POSTCONVICTION RELIEF IS OVERRULED. POSTCONVICTION HEARING HELD  
UNDER ADVISEMENT.

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Counsel appear. Defendant's oral motion to amend  
complaint for postconviction relief is overruled. Postconviction  
hearing held; under advisement.

06/10/2010  
DEFTS MOTION TO AMEND THE MOTION FOR POSTCONVICTION RELIEF IS DENIED.  
Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Defendant's motion for postconviction relief is denied.  
Defendant's motion to amend the motion for postconviction relief is  
denied. Signed Order. Case disposed of.

06/15/2010

BY BRIAN MUNNELLY

DOUG CNTY TO PAY BRIAN MUNNELLY \$2019.37

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Signed Order for Attorney Fees.

07/06/2010

AFFIDAVIT ATTACHED

07/12/2010

& MOTION FOR POSTCONVICTION RELIEF IS OVERRULED.

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Defendant's motion for appointment of counsel on appeal of  
his motion for postconviction is overruled; defendant's motion to  
proceed in forma pauperis on appeal is sustained. Order signed.

07/13/2010

RE: COPY OF MINUTE ENTRY

07/14/2010

FROM NE S/CRT & CRT OF APPEALS RECEIPTING NOTICE OF APPEAL

07/27/2010

TRANSCRIPT OF PLEADINGS

07/28/2010

RE: RECORD PREPARATION DATE

08/02/2010

VOL I

DO CTY PAY LORI A. GRECKAL THE SUM OF \$26.25

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Order for court reporter fees signed.

09/07/2010

RE BOE

12/13/2010

FROM NE S/CRT-COSTS TO BE PD BY DO CTY & TAXED @ \$125

12/16/2010

Judge Name: MORAN

Judge Number and Name: 28 GERALD E. MORAN  
136-218 STATE OF NEBRASKA VS. SHELLY, TYRUS T MURDER, 1ST DEGREE  
(10103); USE OR CARRY WEAPON TO COMMIT A FELONY (21622); MURDER, 2ND  
DEGREE -ATTEMPT (10198); USE WEAPON TO COMMIT FELONY - GUN (21655)  
INFORMATION Pursuant to Mandate from the Nebraska Supreme Court, the  
appeal from the judgment of the District Court of Douglas County,  
Nebraska is Affirmed and costs in the amount of \$125.00 are to be paid  
by the Douglas County.

12/23/2010

TRIP EXECUTED BY DELIVERING PAPERS ONLY TO NE D&E ON 121610

Last viewed on 04/28/2025



0 0 0 1 5 1 8 5 4 D 0 1

## CLERK OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

TYRUS SHELLY,

Defendant.

JOHN M. FRIEND  
CLERK DISTRICT COURT  
JUN 11 2010  
FILED  
JOURNAL CLERK

DOC. 136 PAGE 218

ORDER

This matter came on for an evidentiary hearing on May 28, 2010. The State appeared through Deputy County Attorney, Katie Benson, and Brian Munnelly appeared on behalf of the Defendant. Exhibits 1-4 were offered by the Defendant and were received without objection. The Court also took judicial notice of the court file, including the November 2, 1995 sentencing order and the motion for postconviction relief filed August 4, 2003. Argument was heard on the postconviction motion and the Court took the matter under advisement. Defendant also made an oral motion to amend the motion for postconviction at the time of the evidentiary hearing, which the Court denied from the bench.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant entered guilty pleas to second degree murder, attempted second degree murder and two counts of use of a firearm to commit a felony and was sentenced to a term of incarceration for those convictions November 3, 1995. No direct appeal was ever filed. Defendant filed this motion for postconviction relief August 4, 2003, and the Court overruled the motion. On a stipulation for summary reversal, the Nebraska Supreme Court remanded for an evidentiary hearing to be conducted on the sole issue of whether counsel was ineffective in failing to perfect a direct appeal.

#### **STANDARD OF REVIEW**

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and it is available only when a constitutional right has been infringed or violated.

*State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The evidentiary hearing is limited to the sole issue of whether or not trial counsel was ineffective for failing to file a direct appeal of Defendant's conviction and sentence. In Nebraska, the law provides the following:

Where a defendant has not specifically given instructions concerning an appeal, the first question to be asked is whether counsel consulted with the defendant about an appeal. If counsel has consulted, that is, advised the defendant about the advantages and disadvantages of taking an appeal, “[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal.”

Although the Court agreed that the better practice is for counsel to routinely consult with the defendant regarding an appeal, it rejected a bright-line rule requiring counsel to always consult with the defendant concerning an appeal. *Id.* Instead, the Court held that:

counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

\*\*\*

The Court concluded that to show prejudice related to the failure to file an appeal, “a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.” *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Whether a defendant meets his burden depends on the facts of a particular case. “[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination.” 528 U.S. at 485, 120 S.Ct. 1029.

To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

*State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006) (some citations omitted). *See also Deckard, supra* at 416.

There is evidence from Defendant and trial counsel regarding whether Defendant requested trial counsel to file an appeal. Notably, trial counsel, who is the Douglas County Public Defender and has been with the office since 1975, testified very thoroughly as to how he explains appellate rights to defendants entering a plea, including Defendant. (Riley Dep. 14:1-17:20). Trial counsel further testified that he still consults with defendants even if there are only frivolous grounds to appeal and he would still file any appeal regardless of its merit if requested to do so by a defendant. (Riley Dep. 19:4-22). Regardless of the discussion about appellate rights, Defendant never requested a direct appeal within the thirty days after sentencing. (Riley Dep. 23:5-21). The first time Defendant requested an appeal was during February 2006, which was well outside the thirty days after sentencing. (Riley Dep.; Ex. 1). In reviewing the depositions, the Court finds trial counsel's testimony to be more credible and therefore, the testimony set forth above establishes that trial counsel adequately consulted with Defendant about an appeal and Defendant did not expressly instruct trial counsel to file one within the statutorily required timeframe. Thus, the evidence establishes counsel acted in a professionally reasonable manner. *See Wagner*, 271 Neb. at 261 (finding testimony established counsel was not deficient in that defendant never expressly requested counsel to file an appeal); *Deckard, supra*

(affirming denial of postconviction relief on finding that trial counsel's testimony that defendant never requested a direct appeal was simply more credible).<sup>1</sup>

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendant, Tyrus Shelly's, motion for postconviction relief is denied.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendant, Tyrus Shelly's, motion to amend the motion for postconviction relief is denied.

DATED this 10 day of June, 2010.

BY THE COURT:

Gerald E Moran  
Gerald Moran  
District Court Judge

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<sup>1</sup> Even if the Court found that trial counsel failed to consult with Defendant about an appeal and had to make further inquiry per *Wagner*, the Court finds Defendant failed to meet his burden in establishing that a rational defendant would want to appeal, that he reasonably demonstrated he was interested in appealing within the required timeframe or that he was prejudiced.